Kelly T. Smith 196821
THE SMITH FIRM
1541 Corporate Way, Suite 100
Sacramento, CA 95831
Telephone: (916) 442-2019
Facsimile: (916) 442-0220

Attorney for Petitioner
COALTION FOR ALTERNATIVES TO KIEFER LANDFILL

BEFORE THE CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

COALITION FOR ALTERNATIVES TO KIEFER LANDFILL, a California public benefit corporation, Petitioner, vs. COUNTY OF SACRAMENTO LOCAL ENFORCEMENT AGENCY, Respondent.	Case No. N2005110821 **PETITIONER'S APPEAL** OF THE HEARING OFFICERS REFUSAL TO HEAR REQUEST FOR HEARING [PRC §44310] Prior Prehearing Conference: Date: March 24, 2006 Time: 9:00 a.m. Dept: Assigned Judge: Leonard L. Scott Initial Hearing Date: January 11, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. SUMMARY

The Coalition for Alternatives to Kiefer Landfill ("Coalition") appeals the refusal of the hearing officer Leonard Scott to hear its request for hearing on issues involved in the permitting of the County of Sacramento's North Area Recovery Stations ("NARS"). The Coalition is a California pubic benefit corporation which for more than 10 years has advocated alternatives to the County of Sacramento's Kiefer Landfill.

The County of Sacramento ("County"), responding as the "local enforcement agency" ("LEA") which permitted the NARS facility, objected to the statement of issues submitted by the Coalition with its November 2, 2005 request for hearing.

The hearing officer, Administrative Law Judge Leonard Scott, ordered written argument on the County's objections. The County submitted its arguments on February 15, 2006, followed by its submission of legislative and regulatory language, largely consisting of A.B. 59 (Statutes of 1995, Chapter 952) and excerpts from Title 14 of the California Code of Regulations (CCR).

The Coalition submitted Opposition written arguments.

On April 11, 2006, Judge Scott ruled on the County's motion, holding that the Coalition had no standing to request a hearing because the California Integrated Waste Management Board had concurred in the permit. The judge also ruled that the Coalition has no standing to claim selective enforcement by the County because it is not a competing facility, and that the Coalition's only remedy would be under California Code of Regulations (CCR) §18086, governing certification of local enforcement agencies.

The Coalition appeals the ruling.

The legal regime under which the hearing is requested, Public Resources Code §44307, was recently amended to ensure the public review of solid waste facility permitting. The informal administrative law procedures are to be used, under fine tuning of the law enacted just last year. These enactments were part of the Legislature's address to abuses exactly like that complained of by the Coalition in this instance. Should hearing determine that the County failed to comply with the law, the remedy is expressly provided in solid waste law statutes—an order requiring the operator to cease operating outside permit conditions until the determined defects are cured.

II. BACKGROUND

Sacramento County's motion aborted hearing of the issues raised by narrowing the controversy to nothing, or begging ignorance of the complaints raised by the Coalition. To do so the hearing officer ignored the administrative history, heeding the County's arguments; this mistook the applicable law and misdirected the discussion. Before the final concurrence of the proposed permit by the California Integrated Waste Management Board (CIWMB) on November 14, 2005, the process first took several twists and turns. We review them here and then present the applicable state solid waste law and administrative hearing law.

A. The Administrative History.

In the summer of 2005, Sacramento County sought to increase the amount of solid waste its NARS could accept for one reason: to start taking waste from the City of Sacramento. The City and County had already entered into an agreement for that purpose.

The deal called for the County, through the NARS facility, to accept and the City to pay for roughly 300 more tons per day of City waste, 25,000 tons a year. But the County had a problem: the facility wasn't permitted to accept that much on a daily basis. Its state solid waste facility permit only allowed a maximum of 1,800 tons per day. The City waste would require accepting up to 2,400 tons per day.

The County waste management department went to its sister County agency, the Environmental Management Department (EMD), which was also the "local enforcement agency" under state law for permitting solid waste facilities in the County and sought and obtained an "emergency exemption" from the EMD.

The Coalition contended then, as contends now, that the EMD's approval of the "emergency exemption" was patently improper. In fact, the evidence is clear that the County waste officials falsified their justifications to the EMD of the need for the increased tonnage, or that the EMD was complicit in the impropriety. Exhibit A, Coalition September 2, 2005 letter.

In any event, the EMD as LEA approved the emergency exemption. An emergency exemption to a solid waste facility permit does not require notice to the public. But it does require that the California Integrated Waste Management Board (CIWMB) be notified of the decision. 14 CCR 17210

When the CIWMB staff learned of the emergency approval by the Sacramento County LEA, eyebrows were raised by the CIWMB and the matter was put on the CIWMB's monthly meeting notice and agenda, where the Coalition first became aware of the fact. Exhibit B, LEA emails between County operators and CIWMB.

Abuse of "emergency" permitting by solid waste facilities has a long history as an underground regulation. As noted by a 2000 study by the Bureau of State Audits, the practice had long allowed facilities to operate outside the conditions of their permits, thereby greatly undermining the purpose of state permits for garbage dumps and other solid waste facilities.

Staff for the CIWMB directed the Sacramento County LEA to get the NARS permit properly amended, giving the County a September 30, 2005 deadline for the expiration of the "emergency" permit.

The County EMD acting as LEA accepted and quickly approved an application to amend the NARS solid waste facility permit, scheduling the proposed permit for concurrence before the September, 2005 CIWMB hearing.

The proposed permit increased the tonnage of solid waste accepted at the NARS from 1,800 to 2,400—a 25 percent increase, and upped the number of garbage trucks allowed on a given day from 834 to 1,300—more than half again as much traffic. No improvement to the design or operations was proposed to accommodate these increases.

The environmental review performed for the proposed permit under the California Environmental Quality Act (CEQA) consisted of a wholly inappropriate statutory exemption to environmental review. Those inadequacies had been pointed up repeatedly by CIWMB staff, but County LEA staff grew indignant with state staff's perceived interference with the LEA's putative "local" authority. Exhibit C, emails between LEA staff.

The LEA pushed the permit amendment through to the CIWMB board for concurrence. The Coalition intervened at this point to state its objections to the inadequacies of the proposed permit, citing the in particular the ersatz "emergency" which underlay the hurry-up permit amendment, and the failure to conduct environmental review of a garbage facility creating obvious environmental impacts. Exhibit D, Coalition letter of September 8.

Pressed by the CIWMB staff and boardmembers, the LEA, with the County's acquiescence, agreed to delay CIWMB concurrence in the permit and prepare an environmental review. Exhibit C, LEA emails.

Rather than conduct a full CEQA environmental review, however, the County and LEA merely prepared a "negative declaration" of environmental impacts, again skirting analysis of the environmental impacts of the project.

A public hearing is required before "certifying" the negative declaration environmental document. On October 27, 2005, the EMD as LEA held the public hearing at the NARS facility (rather than a neutral location). At the meeting, the LEA staff announced that the revised permit amendment had already been approved by the LEA and forwarded to the CIWMB for concurrence at its November, 2005 hearing. Counsel for the Coalition, attending the October 27 public hearing, objected to the approval of the permit before the public hearing. Exhibit E, letter of Coalition.

Before the full CIWMB board heard the matter, however, its Permit and Enforcement Committee heard the matter at its November 2, 2005 hearing. Notified of the Coalition's complaint regarding the *post-hoc* environmental review approval, CIWMB staff announced that the County had resubmitted a revised permit application the day before. The P&E Committee therefore recommended approval.

The next week, the full CIWMB board meeting of November 15, 2005 approved the NARS amended permit. The Coalition protested that the approval never publicly noticed the last version of the amended permit. Exhibit F, Coalition letter of the November 15.

Thus the administrative process and result to which the Coalition complains was an integral process extending back to the "emergency" permit. That process, through the various iterations of the permit amendment process, was inextricably intertwined—thus the Coalition's complaint of the corruptions throughout.

B. The Applicable Solid Waste Law.

The above administrative history, for simplicity's sake, excludes much of its context in the solid waste law procedure. Much of the hearing judge's decision relied upon a mistaken argument that concurrence in the permit by the CIWMB constitutes an appeal of sorts. County of Sacramento Written

Argument ("brief") page 5:8-15 ["...the Board is akin to asking a superior court judge to hear an appeal from the decision of a higher appellate court."].

The analogy is *in apropos*; the County and the administrative law judge failed to understand state solid waste facility permitting, an area of environmental law which has in the last year experienced significant changes, changes very relevant to the issues here.

Garbage dumps and other facilities which handle and dispose of solid waste are governed by a unique regime balancing state and local government powers, duties and authority. PRC §40002. While the governing statutes and regulations are lengthy and complex, the recently adopted changes of AB 1497 (Statutes of 2003, Chap. 823, Montanez) are a good starting point. The bill amended the language of PRC §44004 to state the following (emphases added):

> (d) Within 60 days from the date of the receipt of the application for a revised permit, the enforcement agency shall inform the operator, and if the enforcement agency is a local enforcement agency, also inform the board, of its determination to do any of the following:
>
> (1) Allow the change without a revision to the permit.
> (2) Disallow the change because it does not conform with the requirements of this division or the regulations adopted pursuant to this division.
> (3) Require a revision of the solid waste facilities permit to allow the change.
> (4) Require review under Division 13 (commencing with Section 21000) before a decision is made.
>
> (e) The operator has 30 days within which to appeal the decision of the enforcement agency to the hearing panel, as authorized pursuant to Article 2 (commencing with Section 44305) of Chapter 4. The enforcement agency shall provide notice of a hearing held pursuant to this subdivision in the same manner as notice is provided pursuant to subdivision (h).

Thus the LEA under subsection (d)(4) above determines whether to revise a solid waste facilities permit and, if it decides it is necessary, the LEA must conduct environmental review under the California Environmental Quality Act (CEQA). A public hearing is required before adoption of the permit by the LEA, under subsection (e).

The Montanez bill was furthered in 2004 by AB 2159 by Assemblymember Reyes. The bill's author noted:

"In both 2000 and 2003, the California Bureau of State Audits found evidence that the current statutory appeals process requires updating to prevent recalcitrant operators of solid waste handling facilities to continue to operate illegally and delay the correction of health and safety problems at their facilities through extended appeals and legal challenges to enforcement actions." Assembly Committee Analysis, AB 2159.

The 2000 report by the Bureau of State Audits found that many landfill operators used "emergency" permits to extend violations of the permit conditions indefinitely.[1]

Ironically, but very *apropos* here, the County of Sacramento supported AB 2150 because of the LEA's experiences with an obstinate private landfill operator.

These recent changes are important to note. The field's new statutory law has not been implemented by updates to the regulations of the CIWMB.[2] Therefore, when analyzing the law of state waste facility permitting, it is best to resort only to statute.

Part 4 of Title 30 of the Public Resources Code governs solid waste facilities. As a threshold observation: the County misses the mark in emphasizing Chapter 5 of Part 5—that chapter deals with enforcement by the LEA. That is not issue here. Solid waste facility permitting, which is the issue here, is governed by Chapter 3 and Chapter 4.

The County makes much of the "concurrence" required of a permit by the CIWMB, implying that the decision is out of the hands of the LEA. This is entirely inaccurate, as made clear by PRC §44008(a):

> a) A decision to issue or not issue the permit shall be made by the enforcement agency within 120 days from the date that the application is deemed complete pursuant to Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code, unless waived by the applicant. (Emphasis added.)

[1] *California Integrated Waste Management Board: Limited Authority and Weak Oversight Diminish Its Ability to Protect Public Health and Safety*" Bureau of State Audits, 2000.

[2] The CIWMB has been in the process of drafting such regulations for some time. See the Board's website: http://www.ciwmb.ca.gov/Rulemaking/SWFPDevPlan.

Under PRC §44009(a)(1), the CIWMB has 60 days to concur or act not to concur in the permit proposed by the LEA. If the CIWMB board does not act affirmatively within those 60 days, the permit is deemed concurred in by operation of law.

Here we must pay particular attention to subsection (a)(2) of PRC §44009. That section spells out the reasons for which the CIWMB may refuse to concur in the proposed permit.

The list is finite: it includes state operating standards and a prescriptive list of other sections. State operating standards are generally health and safety operations required of a facility. PRC §43020. The prescriptive list of other sections consists of the following: §43040, dealing with financial assurance mechanisms; §43600, concerning a closure plan; §44007, obtaining a proposed LEA permit; §44010, the LEA's statement of compliance with operating standards; §44017, a hazardous waste plan; §§ 44150 and 44152, pertaining to "transformation" facilities.

These are the only bases allowed for the CIWMB to refuse to concur in a permit—and even then only if the CIWMB has "substantial evidence" of these defects in the permit. PRC §44009(c).

What is notable here is that there may be other possible objections to the permit, but they cannot be a basis for the CIWMB to reject a permit. For example, PRC §43300.5 is at issue here:

> The enforcement policies of this division shall be applied equally and without distinction to publicly owned or operated, and to privately owned or operated, solid waste facilities.

It is the Coalition's clearly stated complaint that the LEA has failed to treat the County-owned NARS equally with other, private facilities. PRC §43300.5 can not be a basis for the CIWMB rejecting concurrence in a proposed solid waste facility permit. Nor can the CIWMB reject a permit application for failure to comply with the California Environmental Quality Act (CEQA). The CIWMB cannot reject a proposed permit because it was issued after an ersatz "emergency" permit. Indeed, it might be argued that the CIWMB can not do anything about the LEA issuing an improper "emergency" permit.

But none of that means that the public can't request a hearing of these matters under PRC §44307. In fact, that may be the only to assure that the LEA performs its critical role as the line of defense for the public from the health, safety and environmental impacts of garbage dumps.

C. THE APPLICABLE ADMINISTRATIVE HEARING LAW.

The County contends that the administrative law judges decision improperly applied under California Government Code §11506(a)(3). That section is found within the formal hearing procedures under Chapter 5 of the Administrative Procedures Act. Gov. Code §§ 11500 et seq.

Those procedural grounds for denying hearing are inapt. Section 44307 clearly states that the procedures governing the hearing are the same as those found in Section 44310. That section spells out simple procedures and specifically states that the procedures will follow the informal APA process under Chapter 4.5. 3 CCR §1310.3. See Gov. Code §11445.20(c).

The legislature made clear it did not want to employ the formal procedures under APA's Chapter 5, when it changed the statutory language to that effect in operation January 1, 2005. Exhibit X, West's Annotated PRC §44310, see the language prior to AB 2159.

Provision for a hearing officer to hear §44307 appeals was not enabled until the passage of AB 2159 (Statutes of 2004, Chap. 448, Reyes, effective January 1, 2005). Prior to AB 2159, statute required hearing before a locally appointed panel. Either the local panel or a hearing officer may now conduct the hearing. PRC §44308.

Section 44310(a)(1) is the only section in all statute that references the required "statement of issues." Section 44310(a)(1) first states the a hearing shall be held upon a timely submission of a "statement of issues." Neither the detail, content, format, nor any other requirement for the statement of issues is stated in §44307, or anywhere else in the relevant statutes.

The County's complaints regarding the form of the statement of issues clashes with the intent of the informal procedures of Chapter 10 of the APA. Gov. Code §11445.10(b) conforms perfectly with PRC §44307's intent to assure public review of actions by the LEA: 1) providing a "simpler, more expeditious process" to deal with public policy issues; 2) providing "a forum" for "the public to be heard;" and 3) where "by statute a member of the public may participate..."

Barring the petitioner here, the public, from a hearing of the issues raised on technicalities of form of the statement of issues clearly cuts counter to the intent of the informal hearing procedure provided for by both PRC 44310 and Chapter 10 of the APA.

III DISCUSSION

Fundamental to the County's motion was professed ignorance of the four issues raised by the request for hearing: 1) the "emergency" permit; 2) selective/lack of enforcement by the LEA; 3) improper environmental and permit review; and 4) conflicts of interest.

Throughout the underlying administrative proceedings, the Coalition had objected strenuously to the "emergency" permit, to both the CIWMB, and the LEA. It had objected formally and informally to the process of approving the permit and the environmental review at every stage. The issues taken with the disparity of the LEA's treatment of the public County facility are raised by the request for hearing as the motivation for the shoddy permitting and enforcement conducted by the LEA.

Now the County begs ignorance of these complaints, claiming they are moot or time barred. The question should be seen this way: at any point in this controversy—at the "emergency" permit time, the various permit iterations—if the Coalition had objected then, would the County have wanted it both ways, and claim that the issue was not yet "ripe." Doubtless.

The Coalition now turns to the five issues for which the hearing officer requested further written argument:

A. JURISDICTION.

The County's argument that the hearing official lacks jurisdiction was based upon the County's summary, and erroneous, conclusion that the governing code, PRC §44307, "is limited to appeals of enforcement action only."

Even cursory examination of the relevant statute makes the County's misreading obvious. The section is found under Chapter 30, "Waste Management"; Part 4, "Solid Waste Facilities," Chapter 4, "Denial, Suspension or Revocation of Permits"; Article 2, "Suspension or Revocation." The section itself is entitled: "Hearings; requests by applicants subject to specified actions; petitions alleging agency failure to act as required."

Section 44307 reads:

> "From the date of issuance of a permit that imposes conditions that are inappropriate, as contended by the applicant, or after the taking of any enforcement action pursuant to Part

> 5 (commencing with Section 45000) by the enforcement agency, the enforcement agency shall hold a hearing, if requested to do so, by the person subject to the action. The enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation. A hearing shall be held in accordance with the procedures specified in Section 44310."

The first sentence of PRC §44307 is expressly directed to "the person subject to the action." The second sentence of the section expressly provides a hearing to "any person requesting" a review of "an alleged failure of the agency to act as required by law or regulation."

Statutory interpretation here does not require rocket science. The term "any person" is regularly found in law to apply to the broader public. See e.g. Gov. Code §54960. While there can be limitations upon "any person" in law, here it is obvious that "any person requesting" review to mean any person other than "the person subject to the action," i.e. the operator. As the County notes further in its brief, the operator, also the County of Sacramento, "the person subject to the action," has not requested a hearing. The County, *qua* dump operator, could have asked for a hearing, but didn't.

Much of the County's argument simply doesn't make procedural common sense. The County asserts that a permit isn't final until the CIWMB concurs. At the same time, the County maintains that the hearing process is moot once the CIWMB does act. Once again, this position would completely negate the hearing process afforded to the public by the Legislature.

Furthermore, as detailed above, the CIWMB actually does not conduct a review of the entire LEA action; its refusal to concur is limited to narrow grounds, none of which are even implicated in the issues raised by the Coalition.

Even if the CIWMB did conduct a full review there is nothing in statute that precludes a review of the LEA actions that formed the basis for the CIWMB review. Instead, statute specifically provides for such review upon request by "any person."

B. REMEDIES.

"For every wrong there is a remedy." Civil Code §3523. Under fundamental legal principles, a statute may not be construed as creating a right without a remedy. *Bermite Powder Co. v. Franchise Tax Bd. of Cal.* (1952) 38 Cal.2d 700. "The law neither does nor requires idle acts." Civil Code §3532.

Interestingly, the County contends that the hearing officer has no remedies because the County *qua* dump operator is not a party. As pointed out above, the County as dump operator could have requested a hearing, but didn't.

Furthermore, a common sense interpretation of the parties here would include the Coalition as "any interested person" versus the enforcement agency, again, as clearly spelled out in the statute.

The County brings no statutory or other authority for its summary conclusion that the operator must be a party, well revealing its conflicts of interest here: "Any remedy directed by this tribunal must not infringe on the operator's rights." If that is a problem, the LEA should talk with the Legislature which provided the public with means to assure proper health and safety oversight of garbage dumps—an obvious police power of the state.

The County's brief, beginning at 6:22, foists a circuitous argument that bounces between PRC sections 44307 and 44310. The County claims that Section 44307 refers to 44310, and 44310, according to the County, limits the remedies.

The County is way, way ahead of itself. Section 44307 simply says that the hearing will be held "in accordance with the procedures specified in Section 44310." Indeed, the language of the statute was amended by AB 2159 in 2004 to replace "the requirements" with "the procedures," thus indicating that the Legislature specific intention to avoid the confusion which the County now seeks to roil. [Exhibit X, West's Annotated PRC §44307].

The County's obfuscations ignore the clear remedy provided by PRC §44310(c) :

> Within five days from the conclusion of the hearing, the hearing panel or hearing officer shall issue its decision. The decision shall become effective as provided in Section 45017.

Section 45017, in turn, provides that a cease and desist order will be issued upon the decision. The remedy is thus clearly spelled out in the statute: if the hearing officer finds that the actions were improper, unlawful or unsubstantiated, the actions will be enjoined by operation of PRC §45017, §45005 and §45051.

The County's focus on 14 CCR §18086 is misdirected and misleading. County brief, 5:26-28. The Coalition has never called for a review of the LEA's certification by the CIWMB. The procedures and

processes for certification, review of certification and decertification are involved and quite specific. The Coalition has not raised the issue of the LEA's certification.

The County's claim that the NARS operator has a vested right is asserted without authority. County brief, 6:11-14. If the County has started NARS operations without allowing the administrative hearing process to exhaust, it has done so at its own risk.

PRC §44307 expressly provides "any person" with the opportunity to obtain review of the LEA permitting decision. The County as much as recognizes that this is so. County brief 7:7-9. But the County then engages in a lengthy, somewhat disjointed analysis of "less artfully written" statutes.

The County's statutory analysis at beginning at page 7 of its brief totally misses the mark. Again, the County focuses on statutes' certification procedures for the LEA. The County argues that these certification procedures are the only remedy, diverting discussion to AB 59, passed more than 10 years ago.

As detailed above, the relevant statutes are not those of AB 59, but the more recent amendments in AB 1497 and AB 2159. Those statutory reforms were directed exactly to the issues raised here by the Coalition. PRC §44307 was specifically fine tuned in AB 2159. The Legislature knew what it was doing, and it was doing what it could to fix the problems raised here by the Coalition.

C. VAGUENESS.

Under PRC §44307 and under the informal procedures of the APA, the hearing of the issues is the means to flesh out the complaints, not in the formality of the drafting of the statement of issues.

The Coalition therefore objects to the instant motion as outside the statutory and regulatory scheme provided for hearing of LEA actions or inactions. The informal APA procedures militate against the motion. Even the formal APA procedures would allow amendment if necessary to cure any vagueness.

As discussed above, the County knows full well which actions are at issue here: the improper process of permitting the NARS facility to take the City of Sacramento waste, starting with the improper "emergency" permit and ending with the last-minute permit submittal to the CIWMB, done without the public hearing required under PRC §44004.

The County's professed ignorance of the issues is simply bogus. As the exhibits provided herewith make clear, all of the steps in this slap-dash, wham-bang rush to permit NARS were in contention throughout. The emergency permit, the first rushed permit revision, the second attempted with the negative declaration, the last-minute, third version submitted once the LEA recognized its CEQA hearing was done after the fact, all were part of the approvals to which the Coalition here objects and demands hearing.

Even if the hearing officer were to find that the Coalition's statement of issues is vague, under the formal APA Chapter 5 rules, an accusation may be amended to clarify the complaints "at any time prior to submission of the matter." Gov. Code §11507.

D. SELECTIVE ENFORCEMENT STANDING.

The County argues that the Coalition has no standing to contend that the LEA is tilting the table to favor the County's solid waste operations over private operators. "Appellant has made absolutely no effort to meet the need for a strong showing of discriminatory enforcement." County brief 10:2-3.

This is not a formal hearing under the APA's Chapter 5. Nor is this a criminal proceeding. The Coalition is not asserting a defense. The automatic analogy to the precedent of selective enforcement to those proceedings is simply assumed by the County.

The Coalition at this point has not had the opportunity to present any evidence. The Coalition objects to barring hearing simply on the basis of an inapt analogy.

Perhaps the Coalition's choice of terms in its statement of issues is a source of the confusion here. The Coalition used the terms "selective enforcement" and "lack of enforcement" in an effort to state its issue with the County's favoritism towards itself, as NARS operator. The Coalition's fourth issue of "conflict of interest" is also directed to this allegation.

Rather than review the lengthy precedent of criminal selective enforcement law, we should turn to the simple language of PRC §43300.5 requiring the LEA not to favor public over private operators.

There is nothing in statute which requires the person requesting a §44307 to meet a pleading burden in the statement of issues. Any due process concerns can be easily cured by amendment of the statement

of issues, or stipulation to the issues which will be addressed. The Coalition has attempted to participate in the hearing process to this end. See Petitioner's Prehearing Conference Statement.

The LEA has raised due process concerns for its NARS operator. County brief 6:11-14. Properly, the LEA should not have "due process" issues here: it is a regulatory agency which the Coalition simply claims is not doing the job required by state law. As mentioned herein, the operator could also request its own hearing. The Coalition would not object to the operate responding to the request for hearing. Of course, that would be needless. Because the County Counsel's office represents the LEA already.

E. CONFLICT OF INTEREST.

The Coalition has maintained that the LEA's "selective enforcement" or "lack of enforcement" over County solid waste facilities is driven by a conflict of interest. The hearing officer's order requiring written argument on this issue asked how this could be so in light of 14 CCR §18051(d).

That regulation, 14 CCR §18051(d), is nothing more than an organization chart. The chart must show that the LEA is not the same department operating the landfills. This does not guarantee a lack of conflict of interest. The Coalition has requested a hearing under PRC §44307 to show that a conflict of interest results in violation of PRC 43300.5, requiring equal treatment between public (County) facilities and private (non-County) solid waste facilities.

The County's brief urges as a possible remedy an order that the CIWMB review certification of the LEA under 14 CCR §18086. County brief 13:8-9. Thus the County apparently agrees that there is at least that remedy. Again, the Coalition repeats that it is not seeking hearing over the LEA's certification. It seeks a review of the LEA's failure to properly require permitting of the NARS expansion. This matter is hardly *res judicata* as claimed by the County brief, 13:3-4.

The conflict of interest issue is not resolved by 14 CCR §18051(d). There are specific facts which the Coalition has a right to raise under the hearing review provided by PRC §44307, including the concurrent representation of the operator and the LEA by the County Counsel's office.

IV. CONCLUSION

Statute provides "any person" the right to review the failures of the LEA. Nothing precludes that right here. The objections of standing, jurisdiction, vagueness and remedy brought by the County have no basis whatsoever in the statutory and regulatory scheme here, or in any due process assertion.

The California Integrated Waste Management Board is respectfully requested to reverse the findings of the administrative law judge and order a hearing on the merits. The Coalition requests that any hearing be held before a hearing panel, rather than the administrative law judge.

DATE: April 27, 2006

KELLY T. SMITH
Attorney for Petitioner
COALITION FOR ALTERNATIVES TO KIEFER LANDFILL